CHOP HIAP HIN

v.

LIM BIN SING

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CIVIL SUIT NO. 24-861 OF 1986]
28 SEPTEMBER 1986

CIVIL PROCEDURE: *Application to set aside judgment in default of appearance - On ground that the writ of summons had never been served on defendant - Whether the affidavit of service of the writ failed to comply with O. 62 r. 9 of the Rules of the High Court 1980 - Defence on the merits - Whether any.*

This was an application by the defendant who is a poultry farmer to set aside a judgment obtained against him for RM98,635.19 being the balance which the plaintiffs claim is due to them for chicken-feed sold and delivered by them to the defendant. The writ of summons and statement of claim were served on the 11 July 1986 at about 11.20 a.m. at the defendant's residence and poultry farm.

Judgment in default of appearance for RM98,635.19 together with interest thereon at 8% per annum and costs was obtained on 27 July 1986. This was served to the defendant by registered post on 21 August 1986. The plaintiff's solicitors took out writ of seizure and sale pursuant to which the bailiff of the Court effected seizure on 1 September 1986 and fixed 15 September 1986 as the date of the sale. It was only at this juncture that the defendant sought to resist the legal proceedings against him.

Held:

[1] The defendant had in fact received the summons but chose to forget that he did receive it, because that was the only way in which he could stave off the execution that had been levied.

[2] The defence could not show that the writ and the copy were not subscribed and indorsed in the manner and form prescribed by the Rules of the High Court 1980.

[3] The defence was devoid of any merit.

[4] It was ordered that the sum of RM10,000 which was deposited by the defendant as security for the costs thrown away by the postponement of the sale, be used to pay off the costs incurred by the bailiff and arising out of and incidental to the auction and that any balance left over be paid to the plaintiff in satisfaction *pro tanto* of their claim and costs.

[5] Leave to appeal to the Supreme Court was also refused because there is a preponderance of evidence here to substantiate the view that this is not a fit matter upon which leave should be given.

[Application dismissed.]

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 1, O. 13 r. 7, 9, O. 18 r. 30, O. 62 r. 9

For the plaintiff - Lim Cheun Ren; M/s. Lim & Teng
For the defendant - Lee Buck Heng; M/s. Abdullah A. Rahman & Co.

JUDGMENT

Mahadev Shankar J:

This is an application by the defendant who is a poultry farmer to set aside a judgment obtained against him for RM98,635.19 being the balance which the plaintiffs claim is due to them for chicken-feed sold and delivered by them to the defendant.

On 7 October 1985 the plaintiff's solicitors sent the defendant a registered letter in which they gave notice that unless the sum claimed was paid within 7 days they would initiate legal proceedings for the recovery thereof without any further notice to the defendants.

The defendant did not reply to this letter.

On 9 July 1986 the plaintiff's solicitors filed this writ which was accompanied with a statement of claim.

The plaintiff's solicitors engaged one Othman bin Mohamad, a professional process server, to serve the writ of summons and statement of claim. This he says he did on 11 July 1986 at about 11.20 a.m. at the defendant's residence and poultry farm which is at Parit Jorak, mukim 6, Tonkang Pechah, Batu Pahat. That averment is contained in a formal affidavit of service which he affirmed on 12 July 1986 and filed in this Court. The affidavit recites that at the time and place stated he served the defendant with a true copy of the writ of summons and statement of claim in this action which was issued out of the Registry of this Court dated 9 July 1986. He also states that the defendant admitted to him that he was Lim Bin Sing and accepted the service but refused to acknowledge receipt on the proof copy of the writ of summons. This proof copy was indorsed with the fact of service on the following day and attached there is an exhibit to the affidavit in question.

There after the plaintiff's solicitors filed the certificate of non-appearance and on 27 July 1986 obtained the judgment in default of appearance for RM98,635.19 together with interest thereon at eight (8) percent per annum and costs.

On 21 August 1986 the plaintiff's solicitors served the judgment in default of appearance upon the defendant by sending the same to him by registered post. The covering letter stated that unless the judgement was made execution would be levied without further notice.

Then the plaintiff's solicitors took out writ of seizure and sale pursuant to which the bailiff of this Court effected seizure on 1 September 1986 and fixed 15 September 1986 as the date of the sale.

It is only at this juncture that the defendant sought to resist the legal proceedings against him.

On 11 September 1986 a summons-in-chambers was filed wherein the defendant prayed for an order that the writ of summons and all subsequent proceedings herein be set aside; alternatively, that the default judgment to set aside and the defendant be given liberty to enter an appearance and defend this action.

When the matter was eventually heard the defendant's solicitors advanced only 3 grounds why these orders should be made:

(1) That the writ of summons in this action had never been served on the defendant;

(2) That the affidavit of service of the writ failed to comply with O. 62 r. 9 of the Rules of the High Court 1980;

(3) That the defendant had a good defence to the plaintiff's claim on the merits.

Contentious affidavits were filed by both parties relating to these issues.

When the matter came up before me initially on 14 September 1986, it was immediately apparent that the issue as to whether the defendant had in fact been served with the writ of summons, could not be determined on affidavit evidence because it was an issue of fact which depended upon the respective credibility of the process server on the one hand and the defendant on the other.

I therefore put the defendant on terms and postponed the sale from 15 September 1986 to 24 September 1986.

The hearing was adjourned to 21 September 1986 to enable the parties to have an opportunity to cross-examine the witnesses involved.

In deciding the issues which have been raised I have not only had the advantage now of observing the defendant and the process server under cross-examination, but also of reading the further affidavits which have been filed by both parties in support of their respective positions.

On the balance of probabilities I find as a fact that the defendant was served with the writ of summons and statement of claim. The process server was a disinterested witness. Under cross-examination he described in some detail the route he took to the defendant's premises and no good reasons were provided as to why he should perjure himself. Defence Counsel sought to attack the credibility of this man by seeking to cast doubt as to whether he in fact went to mosque at Batu Pahat that day after effecting service. But the probative value of whether the process server did go for his mid-day prayers is of little relevance to whether he in fact did effect service.

On the other hand the direct evidence on the point was not adequately rebutted by the defendant. Not only was his demeanour unsatisfactory but his bare denial was contradicted by his own evidence when he said under cross-examination that he was not sure whether the writ of summons was one of the documents which he had handed over to his solicitors when he gave instructions for this application to be made.

This was a case of oath against oath. I therefore felt entitled to consider other evidence going to the defendant's track record. He had not formally disputed the plaintiff's initial letter of demand. He did not contest that he had received it in due course of post. But he then chose to deny that he received the default judgment which was also posted to him by registered post. The registration slip to prove postage of the default judgment was in evidence.

On the material available to me, therefore, I had no hesitation in coming to the conclusion that the defendant had in fact received the summons but chose to forget that he did receive it, because that was only way in which he could stave off the execution that had been levied.

The second ground on which the defendant proceeded turns on the provisions of O. 13 r. 7, O. 13 r. 9, and O. 62 r. 9, of the Rules of the High Court 1980 read in conjunction with form no. 137. The crux of this submission is that the affidavits of service filed in this matter by the process server did not contain the *ipsissima verba* of para. 3 of form no. 137 which reads:

> At the time of the said service the said writ (or as the case may be) and the copy thereof were subscribed (and indorsed) in the manner and form prescribed by the Rules of the High Court 1980.

This submission did not find favour with me not only because it was highly technical objection but also because in the present case there was an averment that the copy of the writ which was served on the defendant was a true copy of the writ filed in Court and what is more the proof copy was actually attached to the Affidavit of Service as an exhibit. Defence Counsel with these documents before him could not show that the writ and the copy were not subscribed and indorsed in the manner and form prescribed by the Rules of the High Court 1980. Indeed they were so subscribed and indorsed.

Consequently I am not satisfied that there has been a transgression of the Rules here. But even if there was, it was a clear case for the application of O. 2 r. 1 of the Rules of the High Court which provides that such failure shall be treated only as an irregularity which shall not nullify the proceedings or any judgment therein.

This brings me to the substantial issue in this case. The ground is neatly covered by the defendant's own evidence in cross-examination. He said that he himself did not keep any accounts. He said he thought that he owed the plaintiff something in the order of RM80,000 odd. But he was not prepared to make payment of any sum to the plaintiff until they had rectified their accounts to his satisfaction. With respect, it is the view of this Court, that if a defence had been filed along these lines it would have contravened the provisions of O. 18 r. 30 of the Rules of the High Court which prohibit traverses which are evasive. It is trite law that when a plaintiff claims for a specific sum of money, it is not enough for the defendant to deny that he owes that specific sum of money. He must go on to say what part of that sum he admits owing or he must say that he does not owe the plaintiff at all.

By taking some of the invoices, receipts, and statement of accounts, out of context the defendant sought to urge upon this Court that there were irregularities in the plaintiff's claim which disentitled them to the judgment which they had obtained. In other words it was being submitted that there were grounds for inferring from the plaintiff's own accounts that they had obtained judgment for a larger sum than that to which they were truly entitled.

A close examination of the affidavits filed for the plaintiffs revealed however that except for one clerical error, there was in fact nothing wrong with the plaintiff's accounts at all provided they were viewed in proper chronological sequence. I find that the plaintiff in this case had put up and submitted monthly statements of accounts to the defendant which gave full particular of all transactions both as to invoice numbers and as to receipts and credit notes. The defendant on the other hand had created problems for the plaintiff by giving cheques which were either dishonoured or upon which he stopped payment. There were a few invoices on which his signature did not appear. He sought to take advantage of this by claiming that the goods had not been received. But these denials sounded very hollow when viewed against the backdrop that in all cases the invoices were noted on the relevant monthly statements and in some cases where he claimed non-delivery the invoices had in fact been signed by him or by his representatives.

The most telling point against the defendant in this case, is that, if he had a genuine dispute to raise, he would have done so a long long time ago. The fact that he waited until after the sheriff arrived at his premises, speaks for himself.

Consequently, I was impelled to the conclusion that the defendant's position here was devoid of merit.

I therefore dismissed the application and made a further order that the sum of RM10,000 which was deposited by him as security for the costs thrown away by the postponement of the sale, be used to pay off the costs incurred by the bailiff and arising out of and incidental to the auction and that any balance left over be paid to the plaintiff in satisfaction *pro tanto* of their claim and costs.

Defence Counsel made an immediate application there-after for leave to appeal to the Supreme Court since the value of the subject-matter here was less than RM100,000.

This application I also refused because there is a preponderance of evidence here to substantiate the view that this is not a fit matter upon which leave should be given.

Also found at [1987] 2 CLJ 141